Michael I. Neil, SBN 40057
Hugh A. McCabe, SBN 131828
David P. Hall, SBN 196891
NEIL, DYMOTT, FRANK,
MCFALL & TREXLER
A Professional Law Corporation
1010 Second Avenue, Suite 2500
San Diego, CA 92101-4959
P 619.238.1712
F 619.238.1562

Attorneys for Defendant
SUMMER AYMAR, D.O.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY ESPOSITO, Plaintiff, vs. D. KHATRI, M.D.; C. COOK, AGPA; DR. AYMAR; T.H. CALVIN, J.R., M.D., Defendants.	CASE NO. 08-CV-0742 H (WMC) SUMMER AYMAR, D.O.'S ANSWER TO COMPLAINT

Defendant SUMMER AYMAR, D.O. ("Dr. Aymar"), by and through her attorneys of record, answers the Complaint of Anthony Esposito ("Plaintiff") as follows:

1. As to Paragraph A(1), Dr. Aymar admits, as the claim is pled, subject matter jurisdiction is invoked pursuant to 28 U.S.C. § 1434(a)(3).

2. As to Paragraph B(1), Dr. Aymar admits Plaintiff presently resides at Centinela State Prison, P.O. Box 931, Imperial, CA 92251. Except as expressly admitted Dr. Aymar denies the remaining allegations in this Paragraph.

3. As to Paragraph B(1), to the extent allegations are made against D. Khatri, M.D., Dr. Aymar lacks sufficient information to admit or deny the allegations contained in this Paragraph and, therefore, denies these allegations.

4. As to Paragraph B(1), to the extent allegations are made against C. Cook, AGPA, Dr. Aymar lacks sufficient information to admit or deny the allegations contained in this Paragraph and, therefore, denies these allegations.

5. As to Paragraph B(1), to the extent allegations are made against Dr Aymar, Dr. Aymar denies the allegations in this Paragraph.

6. As to Paragraph B(1), to the extent allegations are made against Travis H. Calvin, Jr., Dr. Aymar lacks sufficient information to admit or deny the allegations contained in this Paragraph and, therefore, denies these allegations.

7. As to Paragraph C(1), Dr. Aymar lacks sufficient information to admit or deny the allegations contained in this Paragraph and, therefore, denies these allegations.

8. As to Paragraph C(2), Dr. Aymar lacks sufficient information to admit or deny the allegations contained in this Paragraph and, therefore, denies these allegations.

9. As to Paragraph C(3), Dr. Aymar lacks sufficient information to admit or deny the allegations contained in this Paragraph and, therefore, denies these allegations.

10. As to Paragraph C(4), Dr. Aymar lacks sufficient information to admit or deny the allegations contained in this Paragraph and, therefore, denies these allegations.

11. As to Paragraph C(5), Dr. Aymar lacks sufficient information to admit or deny the allegations contained in this Paragraph and, therefore, denies these allegations.

12. As to Paragraph C(6), Dr. Aymar admits her “stamp” appears on a Thirty Day Specialty Consult Progress Note dated June 20, 2007. As to remaining allegation in this Paragraph, Dr. Aymar lacks sufficient information to admit or deny them and, therefore, denies the remaining allegations.

13. As to Paragraph C(7), Dr. Aymar lacks sufficient information to admit or deny the allegations contained in this Paragraph and, therefore, denies these allegations.

14. As to Paragraph C(8), Dr. Aymar lacks sufficient information to admit or deny the allegations contained in this Paragraph and, therefore, denies these allegations.

15. As to Paragraph C(9), Dr. Aymar lacks sufficient information to admit or deny the allegations contained in this Paragraph and, therefore, denies these allegations.

16. As to Paragraph C(10), Dr. Aymar admits a Thirty Day Specialty Consult Progress Note was prepared on September 6, 2007 which noted a "Document Change in Clinic Status Since Initial Visit" was "worse." As to remaining allegation in this Paragraph, Dr. Aymar lacks sufficient information to admit or deny them and, therefore, denies the remaining allegations.

17. As to Paragraph C(11), Dr. Aymar lacks sufficient information to admit or deny the allegations contained in this Paragraph and, therefore, denies these allegations.

18. As to Paragraph C(12), Dr. Aymar lacks sufficient information to admit or deny the allegations contained in this Paragraph and, therefore, denies these allegations.

19. As to Paragraph C(13), Dr. Aymar lacks sufficient information to admit or deny the allegations contained in this Paragraph and, therefore, denies these allegations.

20. As to Paragraph C(14), Dr. Aymar lacks sufficient information to admit or deny the allegations contained in this Paragraph and, therefore, denies these allegations.

AFFIRMATIVE DEFENSES

AS AND FOR A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

That at all times and places set forth in the complaint, plaintiff failed to exercise ordinary care on his own behalf, which negligence and carelessness was a substantial factor of some portion, up to and including the whole thereof, of the injuries and damages complained of in this action.

Plaintiff's recovery therefore against this answering defendant should be barred or reduced according to principles of comparative negligence.

AS AND FOR A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

At all times and places set forth in the complaint, parties defendant, other than this answering defendant, failed to exercise ordinary care on their own behalf, which negligence and carelessness was a substantial factor of some portion, up to and including the whole thereof, of the injuries and damages complained of by plaintiff in this action. The fault, if any, of this answering defendant should be compared with the fault of the other defendants and damages, if any, should be apportioned among the defendants in direct relation to each defendant's comparative fault. This answering defendant should be obligated to pay only such damages, if any, which are directly attributable to her percentage of comparative fault. To require this answering defendant to pay any more than her percentage of comparative fault violates the equal protection and due process clauses of the Constitution of the United States and the Constitution of the State of California.

AS AND FOR A THIRD, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

The complaint and every purported cause of action therein fails to set forth facts sufficient to state a cause of action.

AS AND FOR A FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

That the perils or dangers, if any, existing at the time of plaintiff's alleged injuries, if any, were open and obvious and known to plaintiff who nevertheless conducted himself in such a manner so as to expose himself to said perils and dangers, if any, and by so doing, assumed all the risks attendant thereto.

AS AND FOR A FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

The plaintiff has failed to exercise reasonable care and diligence to avoid loss and to minimize damages and, therefore, plaintiff may not recover for losses which could have been prevented by reasonable efforts on his own part, or by expenditures that might reasonably have been made. Therefore, plaintiff's recovery, if any, should be reduced by the failure of the plaintiff to mitigate his damages.

AS AND FOR A SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

That at no time or place set forth in the complaint, did any other defendant operate as the agent of this answering defendant.

AS AND FOR A SEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

This answering defendant is immune from liability pursuant to the Federal Civil Rights Act since she acted in good faith and entertained an honest, reasonable belief that his actions were necessary.

AS AND FOR AN EIGHTH, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

The plaintiff has engaged in conduct with respect to the activities and/or property which are the subject of the complaint, and by reason of said activities and conduct, is estopped from asserting any claim or damages or seeking any other relief against this answering defendant.

AS AND FOR A NINTH, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

The plaintiff has engaged in conduct and activities sufficient to constitute a waiver of any alleged breach of contract, negligence or any other conduct, if any, as set forth in the Complaint.

AS AND FOR A TENTH, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

Due to its tardiness in asserting its purported right to recover, plaintiff's claim should be barred by the equitable doctrine of laches.

AS AND FOR AN ELEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

By virtue of plaintiff’s unlawful, immoral, careless, negligent and other wrongful conduct, plaintiff should be barred from recovering against this answering defendant by the equitable doctrine of unclean hands.

AS AND FOR A TWELFTH, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

To the extent plaintiff’s claims are construed as medical malpractice, plaintiff's action herein is barred by the provisions of California Civil Code section 1714.8 in that the injuries and damages complained of by the plaintiff herein, if any, were solely as the result of the natural course of a disease or condition and/or expected result of reasonable treatment rendered for the disease or condition by the answering defendant herein.

AS AND FOR A THIRTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

To the extent plaintiff’s claims are construed as medical malpractice, the injury, damage or loss suffered by the plaintiff herein is legally caused by the negligent or willful failure of the plaintiff to follow the advice and instructions of his attending physicians/dentists, including this answering defendant and his assistants, and in otherwise failing to exercise ordinary care on his own behalf.

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AS AND FOR A FOURTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

To the extent plaintiff's claims are construed as medical malpractice and in the event this answering defendant is found to be negligent (which supposition is denied and merely stated for the purpose of this affirmative defense,) this answering defendant may elect to introduce evidence of any amounts paid or payable, if any, as a benefit to plaintiff pursuant to Civil Code section 3333.1.

AS AND FOR A FIFTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

To the extent plaintiff's claims are construed as medical malpractice and in the event this answering defendant is found to be negligent (which supposition is denied and merely stated for the purpose of this affirmative defense), the damages for non-economic losses shall not exceed the amount specified in Civil Code section 3333.2.

AS AND FOR A SIXTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

To the extent plaintiff's claims are construed as medical malpractice, amd in the event this answering defendant is found to be negligent (which supposition is denied and merely stated for the purpose of this affirmative defense), this answering defendant may elect to have future damages, if in excess of the amount specified in Code of Civil Procedure section 667.7, paid in whole or in part, as specified in Code of Civil Procedure section 667.7.

AS AND FOR A SEVENTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

To the extent plaintiff's claims are construed as medical malpractice, this answering defendant asserts by way of affirmative defense the applicable provisions of Business and Professions Code section 6146.

AS AND FOR AN EIGHTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

To the extent plaintiff's claims are construed as medical malpractice, this answering defendant alleges that Section 3333.4 of the California Civil Code bars plaintiff from recovering his non-economic damages in this action.

AS AND FOR A NINETEENTH, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

Pursuant to the provisions of Government Code section 820.2, a public employee is not liable for an injury resulting from his or her act or omission, where the act or omission was the result of the exercise of discretionary authority, whether or not the discretion was abused.

AS AND FOR A TWENTIETH, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

The complaint and each cause of action are barred and this Court is without jurisdiction as there has been a failure to exhaust administrative remedies.

AS AND FOR A TWENTY-FIRST, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

The complaint fails to state facts sufficient to constitute a cause of action against any defendant herein in that simple negligence is not a Federal Civil Rights violation.

AS AND FOR A TWENTY-SECOND, SEPARATE AND AFFIRMATIVE DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

This answering defendant was at all relevant times acting within the course and scope of duty of public employment.

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AS AND FOR A TWENTY-THIRD, SEPARATE AND AFFIRMATIVE
DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED
AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

There is no imputed liability between public officers in actions under the Federal Civil Rights Act.

AS AND FOR A TWENTY-FOURTH, SEPARATE AND AFFIRMATIVE
DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED
AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

This answering defendant is entitled to qualified and official immunity.

AS AND FOR A TWENTY-SIXTH, SEPARATE AND AFFIRMATIVE
DEFENSE, THIS ANSWERING DEFENDANT IS INFORMED
AND BELIEVES AND THEREON ALLEGES AS FOLLOWS:

This answering defendant presently has insufficient knowledge or information upon which to form a belief as to whether she may have additional, as yet unknown, affirmative defenses. This answering defendant reserves the right to assert additional affirmative defenses in the event discovery indicates it would be appropriate.

WHEREFORE, this answering defendant prays that plaintiff take nothing by way of his complaint on file herein, that judgment be entered in the within action in favor of this answering defendant and against the plaintiff upon the issues of the complaint, together with an award to this defendant of attorneys' fees and costs of suit herein incurred, and such other and further relief as the Court deems just.

Dated: August 27, 2008

NEIL, DYMOTT, FRANK,
MCFALL & TREXLER
A Professional Law Corporation

By: /s David P. Hall
Michael I. Neil
Hugh A. McCabe
David P. Hall
Attorneys for Defendant
SUMMER AYMAR, D.O.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38, Dr. Aymar hereby demands trial by jury.

Dated: August 27, 2008

NEIL, DYMOTT, FRANK,
MCFALL & TREXLER
A Professional Law Corporation

By: /s David P. Hall
Michael I. Neil
Hugh A. McCabe
David P. Hall
Attorneys for Defendant
SUMMER AYMAR, D.O.